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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **BENCH MEMORANDUM ON DISMISSAL WITH PREJUDICE** **UNDER SEAL**

Defendant Steven DeMocker, by and through counsel, hereby provides this Court with a Bench Memorandum on the necessity of dismissal of this case with prejudice given the recent developments arising from the State's repeated attempts to interfere with Mr. DeMocker's Sixth Amendment right to counsel and the related implications that flow from Ethical Rule 1.7. The charges against Mr. DeMocker should be

dismissed. While the defense certainly understands the Court's reluctance to take this step, it is required as a result of the State's conduct and as a matter of law. The words of our Arizona Supreme Court written 10 years ago strike the correct note:

> Application of double jeopardy is not only doctrinally correct when egregious and intentional prosecutorial misconduct has prevented acquittal, it is also required as a matter of pragmatic necessity. Any other result would be an invitation to the occasional unscrupulous or overzealous prosecutor to try any tactic, no matter how improper, knowing that there is little to lose if he or she can talk an indulgent trial judge out of a mistrial.

State v. Jorgenson, 198 Ariz. 390, ¶ 13, 10 P.3d 1177 (2000).

Alternatively, should this Court not dismiss this case with prejudice, the Yavapai County Attorney's Office should be disqualified from further prosecuting this case and the matter should be stayed to permit Mr. DeMocker's next attorneys to seek special action review of the Court's decision.

This Memorandum is based on the due process clause, the Fifth, Sixth, Eighth and Fourteenth Amendments, and Arizona counterparts, Arizona Rules of Evidence, Rules of Professional Conduct, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background

At defense counsels' request, the Court called off the jury for a week until Tuesday, September 28, to permit counsel appropriate time to consult and consider newly discovered information[1] and to assess counsels' ability to continue to represent Mr. DeMocker. A hearing outside the presence of the jury was set for September 24 so that counsel could provide an update to the Court.

[1] This information was revealed to defense counsel by the State on September 19, 2010, and relates to the "anonymous email."

On September 23, 2010, Deputy Yavapai County Attorney Joe Butner advised defense counsel that Yavapai County Sheriff Steve Waugh [redacted] In response, on that same date, the defense filed a "Notice of Developments Related to Ethical Rule 1.7" in anticipation of the hearing to be held the following day. The Notice requested dismissal with prejudice or disqualification of the Yavapai County Attorney's Office. Around noon on September 24 just prior to the hearing, the defense received a copy of [redacted] We then learned that all [redacted] The Sheriff [redacted] At the hearing on September 24, the Court, recognizing the "profoundly significant" events of the last few days, requested additional briefing on the motion to dismiss and set a further hearing for September 27.

II. The State's Intentional, Repeated Violations of Mr. DeMocker's Sixth Amendment Right to Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ...to have the Assistance of Counsel for his defense." The Supreme Court has held that this includes the right to the defendant's counsel of choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006), citing *Wheat v. United States*, 486 U.S. 153, 159 (1988). "We have previously held that an element of this

[2] The same date the State [redacted] Counsel have not seen [redacted]

[3] The [redacted] also refers to the prior [redacted] that was represented as having been filed under seal by the County Attorney. The defense is not aware of how the Sheriff came into possession of information relating to the substance of this prior under seal [redacted]

right is the right of a defendant who does not require appointed counsel to choose who will represent him." *Id.* This right does not arise from the right to a fair trial, but rather, "a particular guarantee of fairness to be provided, to wit, that the accused be defended by the counsel he believes to be best." *Id.* at 146. A violation of the right to counsel of choice is a structural error that requires reversal. See *Gonzalez-Lopez*, 548 U.S. at 150. This is so because the right to counsel of choice implicates "myriad aspects of representation" and "bears directly on the 'framework within which the trial proceeds... .'" *Id.* at 50, citing *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991).

The right to counsel under the Sixth Amendment entails "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia,* 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981) (citing *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)). A defendant suffers ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance. *See Winkler v. Keane,* 7 F.3d 304, 307 (2d Cir.1993) (citing *Strickland v. Washington,* 466 U.S 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *United States v. Fulton,* 5 F.3d 605, 609 (2d Cir.1993).

The court has an obligation to inquire whenever information of a serious conflict of interest arises. *See Wood,* 450 U.S. at 272-73, 101 S.Ct. at 1103-04; *Cuyler,* 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway,* 435 U.S. at 484, 98 S.Ct. at 1178-79. This is so whether the facts occasioning the conflict arise from the representation by defense counsel of a third party or from allegations of wrongdoing by defense counsel. The court must investigate the facts and details of the attorney's interests to determine, if it can, whether the attorney in fact

suffers from an actual conflict, a potential conflict, or no genuine conflict at all. *See Strouse v. Leonardo,* 928 F.2d 548, 555 (2d Cir.1991) ("In order to protect a defendant's right to conflict-free counsel, the trial court must initiate an inquiry when it knows or reasonably should know of the possibility of a conflict of interest."); *see also United States v. Aiello,* 814 F.2d 109, 113 (2d Cir.1987) (Sixth Amendment "imposes a duty upon a trial court to inquire"). All of these essential judicial responsibilities have previously been the subject of extensive briefing and argument in this Court. (*Mickens v. Taylor,* 535 U.S. 162, 122 S.Ct. 1237 (2002), mentioned by this Court last week, cites and summarizes many of these cases. Much of the analysis in that case addresses standards for the review by a federal court of state court judgments on habeas corpus and is, therefore, of limited application to the questions now before this Court.)

As has also been thoroughly examined in this case, the Sixth Amendment inquiry also implicates obligations of defense counsel under Ethical Rule 1.7. That rule provides that a lawyer may not represent a client if the representation involves a concurrent conflict of interest. E.R. 1.7(a). Comment 10 to this rule provides that "[t]he lawyer's own interests should not be permitted to have an adverse effect on the representation of a client." Where, as here, a lawyer does not and can not "reasonably believe[] that [he or she] will be able to provide competent and diligent representation," no waiver is permitted. E.R. 1.7(b)(1). All of this became familiar territory only a few weeks ago when the State made other allegations against defense counsel, and now the State has again attempted to create a conflict between Mr. DeMocker's interests in defending himself and his counsel's interest in defending themselves against accusations of professional misconduct and criminal acts.

A conflict implicating both the Sixth Amendment and our ethical rules exists if an attorney is investigated for activities substantially related to the charges against the

defendant. *See e.g. United States v. Pizzonia*, 415 F. Supp 2d 168 (E.D. NY 2006). A conflict also exists where a false allegation limits an attorney's ability to cross-examine a witness. *See e.g. United States v. Fulton*, 5 F.3d 605, 613 (2d Cir. 1993). In response to the second [redacted], counsel relied on authority that provided that a court can, in some limited circumstances, conduct an inquiry into the allegations and avoid a conflict by finding that the allegations are unfounded. See Defendant's Bench Memorandum on Procedures for Determining if an Unwaivable Conflict Exists (dated August 6, 2010) citing *United States v. Jones*, 900 F.2d 512, 519 (2d Cir. 1990) citing *United States v. Osorio Estrada,* 751 F.2d 128, 132 (2d Cir.1984), *aff'd on reh'g,* 757 F.2d 27, 29 (2d Cir.), *cert. denied,* 474 U.S. 830, 106 S.Ct. 97, 88 L.Ed.2d 79 (1985).

Such an inquiry by the Court is not possible under the circumstances occasioned by this latest [redacted]. This [redacted] against Mr. DeMocker both in this prosecution and in the new charges he faces. The allegations relate, as this Court noted during the hearing last Friday (September 24), both to the Hartford insurance matter previously addressed by this Court and to specific aspects of the so-called "anonymous email" charges. Any inquiry by the Court, as well as any response by defense counsel, would necessarily invade the province of the attorney-client relationship.

When the Court and counsel were forced to address the [redacted] and the notice of a [redacted], we advised the Court that they could only continue to represent Mr. DeMocker at trial if they were not forced to respond to ongoing baseless charges of misconduct.[4] (July 17, 2010 Defendant's

[4] In addition to the [redacted] and the criminal investigation (stayed and to be referred outside of Yavapai County), the State also filed a "Motion to Determine Counsel" which included false and unsubstantiated allegations against defense counsel. These allegations were made public by the State in open court and ended up in the Prescott *Courier* mid-trial on July 9, 2010. The State also attempted to withhold relevant documents and interviews from the defense. This Court ordered the interviews

Response to the Court's Inquiries from July 14, 2010). The State was fully aware that persistent assertion of allegations of misconduct would lead to further disruption of the attorney-client relationship. The State's filing of [redacted] can only be seen as an additional intentional interference with Mr. DeMocker's Sixth Amendment right to counsel and a direct and obvious effort to drive this defense team off the case during trial.

Whatever the State's intentions, the consequences include the likely tainting of the jury sitting in this case. The State's filing of a public pleading mischaracterizing this recent information as a "confession" led to the article attached to [redacted] which describes the information as "explosive." While publicity in and of itself cannot create prejudice unless it is read, viewed or heard by the jurors, it is nearly impossible to assess the impact of ongoing publicity on this panel. It is highly unlikely that anyone in this group of jurors would step forward and admit they have read or heard about the coverage of recent events surrounding this trial and have formed an opinion about it. It would take almost superhuman effort for a juror in this case to not

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and documents disclosed on August 3. More recently, the State conducted a six hour interview of Chris Kottke and has refused to disclose it to the defense. On information and belief this interview is relevant to the allegations regarding the payment of the insurance proceeds in this case and Sheila Polk advised Mr. Kottke during the interview that she had an obligation to disclose the interview to the defense. This interview is also believed to be a violation of the State's avowal to this Court that any investigation related to this matter would be stayed and referred out of Yavapai County.

The State's prior misconduct in this case also includes misstatements and omissions to the first grand jury, resulting in a remand by the Court; late disclosure of thousands of documents, witnesses and experts, previously sanctioned by the court; [redacted]; the late dismissal of the death penalty after death qualifying a jury of 40 people, at great expense to the Court, the parties and the County; the public filing of documents making unfounded allegations about the source of Mr. DeMocker's legal fees; violations of Court orders regarding biological evidence, for which they were sanctioned by the Court; the destruction of biological evidence, also resulting in sanctions by the Court; announcing for the first time after 7 days of trial testimony that it would need 25 additional days to complete its case-in-chief, creating a trial two months longer than proposed during voir dire; false allegations of judicial misconduct by Judge Lindberg based on his sanction for the destruction of biological evidence; and the routine and prejudicial failure to file documents under seal (including, just last week, documents with victims' bank account information on the court's website and well as a pleading falsely characterizing the "anonymous email" as a "confession.").

have their curiosity piqued. In Prescott, a semirural community, the local publicity about this case has been ongoing and relentless. This Court's concern in this regard, expressed at the sealed hearing on September 24, is certainly warranted.

III. The Charges Must be Dismissed With Prejudice

It is no answer for the State to claim that it is not responsible for the resulting Sixth Amendment violation because Sheriff Waugh rather than Sheila Polk submitted this [redacted] It is the State of Arizona prosecuting Mr. DeMocker and it is against the State that this Court is bound to protect invasion of Mr. DeMocker's Sixth Amendment rights. "[F]or purposes of guaranteeing a criminal defendant's rights, the state and all its offices must be considered a single entity." *State v. Tucker,* 133 Ariz. 304, 308 (1986).[5]

While not entirely analogous, the Court's analysis of the Sixth Amendment violation in *State v. Warner* is instructive. *State v. Warner*, 772 P.2d 291, 295, 150 Ariz. 123, 127 (1986). In *Warner,* the Arizona Supreme Court set forth a procedure to determine if a Sixth Amendment violation occurred, and if so, to fashion the appropriate relief. There, the Sheriff seized defendant's papers and defense counsel's work product from defendant's cell and turned them over to the County Attorney's office. After his conviction, the defendant's appeal raised a Sixth Amendment violation. The Supreme Court found a presumptive violation of Sixth Amendment rights and remanded for an evidentiary hearing, instructing the trial court to "make separate and detailed findings regarding the motive behind the seizure of defendant's papers, the use made of them, whether the interference with the attorney relationship was deliberate, whether the state

[5] The Arizona Supreme Court has rejected arguments by the State that the County Attorney's office is free from blame where a violation of a defendant's rights occurred when the sheriff's office seized defendant's documents. *State v. Warner*, 772 P.2d 291, 295, 150 Ariz. 123, 127 (1986). The Supreme Court held, "[b]oth offices are government entities and the judicial standards governing investigative misconduct are equally applicable to prosecutors and police." *Id.* citing *State v. Tucker,* 133 Ariz. 304, 308, 651 P.2d 359, 363 (1982); B.L. Gershman, *Prosecutorial Misconduct* § 1.2 (1985). The Court further concluded, "[i]f this were not so, prosecutors would be able to persuasively argue, for example, that the exclusionary rule should not apply in cases of police misconduct."

benefitted in any way from the seizure, if the papers were used how any taint was purged in defendant's trial and whether defendant was, in fact, prejudiced." 150 Ariz. at 129, 722 P.2d at 297. *Warner* concluded that the trial court must be convinced beyond a reasonable doubt that defendant was not prejudiced by the government's conduct. *Id.* at 128, 722 P.2d at 296.

Of course, there are several important differences between that case and what we encounter here. This case involves the complete denial of Mr. DeMocker's right to counsel of his choice. This Court is also not considering the issue post-conviction. Mr. DeMocker has not forfeited the presumption of innocence in the eyes of the Law. However, the Court's presumption of a Sixth Amendment violation from the more limited intrusion occasioned in *Warner*, and the Court's burden shifting to the State to disprove prejudice beyond a reasonable doubt, is instructive as to how the Court should proceed here. Likewise, the factors identified as relevant in *Warner* to determine the remedy, lead inevitably to the conclusion that dismissal is the only appropriate remedy in this case.

Here, the motive behind the State's conduct in filing this [redacted] is clearly to deprive Mr. DeMocker of his counsel of choice; the deliberate nature of the complaint is obvious given the Court's prior warnings; and, perhaps most significantly, the pervasive prejudice that results from a mistrial and deprivation of counsel of choice is compelling because we know that this choice effects "myriad aspects of representation" and "bears directly on the 'framework within which the trial proceeds... .'" *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991).[6]

[6] Counsel acknowledge cases requiring consideration of remedies other than dismissal where there is a limited intrusion into an attorney client communication, *see e.g. State v. Pecard*, 196 Ariz. 371, 998 P.2d 453 (Ariz. App. Div. 1999) (remanding for a determination of prejudice where no inquiry was made by trial court). However these cases do not address the remedy for a complete denial of counsel of choice, as is occasioned by the State's conduct here. Many of these cases require dismissal, even for more limited intrusions on the Sixth Amendment than are present here. *See State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019, 1023 (1963) (sheriff's officers eavesdropping on private consultations between defendant and attorney "vitiated the whole criminal proceeding" and required dismissal); *United States v. Orman*, 417 F.Supp. 1126 (D.Colo.1976) (wiretap of defendant's telephone and

In *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), the United States Supreme Court plurality opinion held that:

> the circumstances under which ... a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

Id. at 2091. The plurality believed that:

> a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id. at 2089.

"Arizona case law is to the same effect as the federal cases in holding that intentional judicial or prosecutorial overreaching designed to cause a mistrial will result in a bar to any further prosecution." *Pool v. Superior Court in and for Pima County,* 139 Ariz. 98, 106 (1984). Article 2, Section 10, of the Arizona Constitution, the double jeopardy clause, forbids retrial when there is "intentional prosecutorial misconduct." *State v. Jorgenson,* 198 Ariz. 390, 391, ¶¶ 3-4, 10 P.3d 1177, 1178 (2000).

"Applying the *Pool* principle to the situation found in the original appeal in this case, **we have no choice but to take the unfortunate step of approving the trial judge's order of dismissal on double jeopardy grounds.** We do not take this action to sanction the prosecutor for misconduct but because our constitution's double jeopardy clause requires it. **We are quite sure the present trial judge took no more pleasure than we do in dismissing the case with prejudice, but the blame must be found**

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surveillance of conferences between defendant and attorney required dismissal because the government learned of defense plans and strategy as a result of the intrusion); *United States v. Levy,* 577 F.2d 200 (3rd Cir.1978) (dismissal required where codefendant, who was informer for state, obtained confidential attorney-client communication involving defense strategy and disclosed the information to the prosecution); *Barber v. Municipal Court,* 24 Cal.3d 742, 157 Cal.Rptr. 658, 598 P.2d 818 (1979) (dismissal required where government informers secretly attended numerous meetings of defendants with counsel in which they discussed defense strategies).

elsewhere." *Jorgenson*, 198 Ariz. at 393, 10 P.3d at 1180 (emphasis added). The decision whether to grant a motion to dismiss is within the sound discretion of the trial court, which will not be disturbed absent an abuse of discretion. *See State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988).

The State's ongoing pattern of attempts to interfere with Mr. DeMocker's right to counsel must finally be stopped by this Court and a dismissal with prejudice must be ordered. No other remedy is now appropriate given the State's persistence in conduct that previously brought us to the brink of a Sixth Amendment crisis. The State was specifically advised that defense counsel could not continue to both defend Mr. DeMocker and defend themselves from ongoing personal and professional attacks. In the face of such a warning and after [redacted], a criminal investigation and a litany of other misconduct, the State has demonstrated its willingness to stop at nothing to deprive Mr. DeMocker of his right to counsel of his choice by creating a conflict. The present [redacted] and even if it did have any merit, there was no reason compelling it to be filed mid-trial. Any inquiry into the present [redacted] creates intractable problems pursuant to ER 1.7. The State knew this and yet did it anyway. This is precisely what the double jeopardy clause was intended to prevent.[7]

Given that the Arizona Supreme Court has determined that the State of Arizona is to be treated as a single entity, vis a vis Mr. DeMocker's Sixth Amendment right, the State's arguments regarding vicarious disqualification are irrelevant. The County Attorney and the Sheriff are as one in their violations of Mr. DeMocker's right to counsel. Therefore, if the Court refuses, over objection, to dismiss this case with

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[7] Counsel searched for and engaged others to assist (including Westlaw resource attorneys) and could find no case directly on point where mid-trial [redacted] Presumably if a case was dismissed mid-trial based on such misconduct, there would be no resulting conviction and appeal. That may explain the absence of authority directly on point.

prejudice, this Court should disqualify the Yavapai County Attorney's Office from continued prosecution of Mr. DeMocker. "Disqualification of a prosecutor for a conflict of interest implicating due process rights is within the court's discretion." *Villalpando v. Reagan*, 211 Ariz. 305, 308 (App. 2005). "[The prosecutor] represents the sovereign whose obligation is to govern impartially and whose chief object is justice. Public confidence in the criminal justice system is maintained by assuring that it operates in a fair and impartial manner. This confidence is eroded when a prosecutor has a conflict or personal interest in the criminal case which he is handling." *Turbin v. Superior Court*, 165 Ariz. 195, 198 (App. 1990), citing *State v. Latigue*, 108 Ariz. 521 (1972). Here, Yavapai County has indicated an interest that is inconsistent with the duty to safeguard justice in its ongoing and repeated attempts to undermine Mr. DeMocker's right to counsel of choice. Therefore, the continued involvement of the Yavapai County Attorney's Office violates Mr. DeMocker's right to fundamental fairness. Such a remedy does not, however, address the prejudice to Mr. DeMocker's Sixth Amendment rights from the State's misconduct. Whatever the motive of the Sheriff, and whatever the purpose of the State in interjecting new and defamatory allegations into this case, the effect on Mr. DeMocker's Constitutional rights leads us to the same conclusion.

DATED this 27th day of September, 2010.

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